ENGLISH CIVIL LAW

II

MAN is a creature of impulses and tendencies. Whether the impulses produce the tendencies, or *vice versa*, whether they are unrelated, whether an impulse is merely a rapid tendency, are questions to be discussed by psychologists and physiologists. The jurist is, however, profoundly concerned with these primordial qualities of human nature; and it is a cardinal weakness of the utilitarian or Benthamite school of reformers, that they assume the conduct of the average man to be guided mainly by reason, whereas it is, in fact, mainly guided by the primitive impulses and tendencies to which allusion has been made. Reason is doubtless the supreme quality. Unfortunately there is, as Napoleon remarked of the British infantry, 'very little of it' in the conduct of the average citizen. And, if this be so, even at the present day, still less did reason govern the conduct of humanity in its earlier stages of development, when the foundations of law were laid.

Another element in the position is the fact that almost all primitive instincts are, in themselves, neither bad nor good, but neutral. Their virtue or vice depends entirely on the uses to which they are put.[1] Acquisitiveness, curiosity, imitativeness, concupiscence, credulity, are obvious examples of this truth; and even fear and jealousy, unlovely as they seem to the observer, have undoubtedly had, in the history of the race, both individual and social value.

Neither can it be denied, that of all the instincts of mankind, the egoistic or self-regarding are the most ancient and deep-seated. Even if we do not go so far as to regard all altruistic or social tendencies as derived originally from the egoistic,[2] we must unquestionably admit their relative inferiority in point of strength and age,

[1] Perhaps the best proof of this truth is to be found in the fact that most gestures of affection are fictitious gestures of hostility, *e. g.*, the kiss is a sham bite, the friendly nudge in the ribs a sham dagger thrust.

[2] *E. g.*, from the maternal instinct, which is, probably, itself derived from the fact that the offspring once formed, physically, a part of the mother.

for the simple reason that primitive instincts are based on physical feeling, and that, though our researches into the history of mankind go pretty far back, we have discovered no trace of an epoch when individuals were clustered together in physically connected groups capable of identical physical feelings. That a primitive group, suddenly attacked by a common calamity, *e. g.*, a famine or an avalanche, might develop a feeling of sympathy from common misfortune, is not to be denied; though the evidence would seem to show that such an event was at least as likely to intensify the egoistic instincts. But even that would be long subsequent to the development of the latter.

Now if there is one thing clearer than another about law, in the sense of the jurist, it is, that it is a social force. Not only does it rest, ultimately, on the approval of the more influential members of the community, but it is manifestly intended to secure objects which those members believe to be desirable in the common interest. At least this is so in every system of law which does not profess to rest simply and solely upon the *manus militaris;* and the latter kind of system is far rarer than is commonly supposed.[3] It is obvious, therefore, that the first purpose, at any rate of every indigenous system of law, is to repress such developments of egoistic instincts as manifestly run counter to common interests, and to encourage those which foster and develop such interests.

Manifestly, that egoistic instinct which is most dangerous to common interests, because clearly, if not checked, destructive of the community, is the unrestrained exercise of predatory desires. In so far as these are directed against the means of sustenance, they are bad enough; but when they extend to the persons of the members of the community, they are absolutely fatal, because they inevitably provoke a revenge which, carried to its natural conclusion, means the extinction of the group. Doubtless the mere recognition of this fact marks a considerable stage in the development of intelligence; and we cannot be quite sure of the process which led primitive man to the conviction that the weakening of his community was a bad thing. All we know is, that the conviction was very early formed — so early, indeed, that it seems to be present in

[3] The difficulties involved in maintaining such a system, even by overwhelming military force, are well exemplified by the indignities suffered by the Prussian military administration in Belgium during the war.

some of the higher animals, such as orang-outangs and peccaries, who will deliberately avenge the death of a comrade.

Note, however, that the primitive group had no executive machinery for putting down violence, even if we allow that it might be roused occasionally to common action by some specially atrocious deed which manifestly struck at the life of the community, *e. g.*, betrayal to a hostile group or insult to the tribal gods. This is probably the origin of that popular process known as the 'hue and cry', which later developments have refined into the *posse comitatus* of the modern sheriff.[4] For the most part, however, the violence merely directed against individuals is left to the homeopathic treatment of the blood feud — how established, we know not, but quite evidently based on a sound knowledge of human nature. Why the infliction of suffering should be an assuagement of suffering undergone by the agent, is one of the mysteries of human nature. The fact that it is so, in unrefined human nature, can hardly be questioned by students of social history.[5]

From the blood feud springs, by palpable filiation, the litigatory process, *i. e.*, the older type of civil action, in which the complainant tries to make good his claim against the defendant according to the rules of the game, the court (whether consisting of village elders or a royal official) merely standing by to see fair play. The prize of victory is older than the civilized lawsuit, and has persisted into that stage. It is the *wergild* or blood-fine, now rationalized (somewhat imperfectly) into 'damages', and supposed to be based on the material loss suffered by the plaintiff; but the very confusion between 'damages' and 'damage' will suggest that there are still traces of the old idea of consoling the plaintiff by the suffering of the defendant.[6] Later, of course, comes the inquisition process, in which the King or State, now firmly established, conducts an investigation on his or its own account, and, according to his or its views of the wrongdoer's conduct, awards punishment for the good of the latter's soul or as a warning to others. At first this type of

[4] A reference to this venerable institution is clearly contained in that very modern statute, the Sheriffs Act, 1887 (s. 8. The 'cry of the country').

[5] The references to the blood feud in early codes are numerous. One of the best known is that of the Twelve Tables ('*si membrum rupit, ni cum eo pacit, talio esto*').

[6] The intermediate stage is the 'penal action,' well known in classical Roman law, and still faintly surviving in England. 'Vindictive damages' are, perhaps, also a survival of the same ideal.

process is confined to acts which threaten the safety of the community — *i. e.*, it is an alternative of the rough communal action above described. But later on, as in the English 'equity' jurisdiction, it may be placed at the disposal of the private litigant.

One of the most curious facts of English legal history is that, parallel with this application of the inquisition process to civil actions, there was a profound reaction, due, of course, largely to the jury system, toward the litigatory type of process in the original domain of the inquisition — *viz.*, criminal prosecutions. Of the gain to humanity of this reaction, there can be no question. Bloodthirsty as was the English criminal law in the eighteenth century, its administration was rose water compared with the unspeakable horrors of contemporary Continental systems. It can hardly be doubted that this modification of the inquisitionary character of criminal process also facilitated greatly the supersession of the old 'appeal of felony' by the more civilized procedure of indictment;[7] and it would be interesting to compare in detail the corresponding movement, before alluded to,[8] in Continental criminal systems, which admitted the *partie civile* to a formal partnership with the State in the conduct of prosecutions. At first sight it looks as though the root idea in both policies were the same, *viz.*, the enlisting of the primitive desire of individual vengeance on the side of the common interest; but the difference in the methods is not without significance.

And if we look a little deeper into the characteristics of English law, we shall probably realize that the very success of the executive government in England in repressing disorder and 'self-help' seems to have arrested the development of what may be called 'community action' through law. For, whilst the long agony of the wars of religion on the Continent was at last ended only by that deification of the State which produced the absolutism of the eighteenth century,[9] the comparatively mild experiences of England in

[7] Of course there were other and more specific inducements — *e. g.*, the provision of the statute of 1529, which enabled the prosecutor in robbery or larceny to recover his goods after conviction of the thief (SHORT HISTORY OF ENGLISH LAW, pp. 156–57).

[8] 30 HARV. L. REV. 9.

[9] Perhaps, as v. Bar appears to hint, the 'reception' of the Roman law may have had something to do with the change. But as v. Bar himself points out, the Roman conception was itself due to the bellicose history of the Roman City State (HISTORY OF CONTINENTAL CRIMINAL LAW (Am. translation), pp. 17, 203).

the Wars of the Roses and the Civil War left the average Englishman still unaware of that abstract 'sovereign' which the speculations of Bodin and Montesquieu, and the despair caused by social anarchy, were generating on the Continent. In spite of Hobbes and his *Leviathan*, the average Englishman remained cold to the notion of an abstract, all-powerful, passionless Commonwealth, and preferred to speak and think of a King who was, no doubt, by far the most powerful person in the land, with a vast machinery of Parliament and Courts of Justice acting in his name, whose help it was especially valuable to have on one's side, but still, on the whole, a perfectly concrete and intelligible person, with human weaknesses and limitations. It may have been want of imagination, incapacity for idealism, any other 'innate' defect you like in the Englishman's character; but it seems at least to have left him a singularly practical and self-reliant person, who, in that eighteenth century when the Continent was absorbed in dynastic and territorial wars, was quietly gathering to himself a world-wide empire, which the mismanagement of a handful of 'State' officials at Whitehall did its best, happily with only partial success, to destroy.

And, of course, it is idle to suppose that a people with the record of the English in the eighteenth century was without ideals. The world had, on the whole, gone very well with the Englishman; and this fact, added, doubtless, to his insular position, had generated in him a bold spirit of self-confidence which not only led him to compare himself favourably with foreigners, but caused him to resent fiercely any interference with his freedom of action. He had a deep respect for law, but from a strictly individual standpoint, as a shield which would at once protect him against the encroachments of others upon his freedom, whether those others were government officials or private persons, and yet leave him at liberty to carry on his own pursuits, regardless, to a large extent, of the welfare of others, which is, of course, only another aspect of the same desire. Only when he had himself voluntarily undertaken liabilities, was he willing to recognize them; in that case his common sense taught him that, without mutuality, he could expect no similar recognition from others. Hence the completeness of the English Law of Contract; hence also the limitations of the English Law of Torts and English Family law. Hence also the unique freedom of testation in English Law.

But there can be little doubt that another and very strong reason for the Englishman's respect for his law is the fact that he regards it, and very rightly, as his own production. The writer trusts that he has given due consideration to the arguments of those who maintain the authoritarian view of law, as a rule of conduct imposed from above rather than worked out from below; and particularly he has not failed to study one of the latest and ablest presentations of the authoritarian theory in the work of the late Royall Professor.[10] But still, he is prepared to maintain that, so far as English Civil Law is concerned, the facts are against the authoritarian view, with small and inconsiderable exceptions. Not to labour again the explanation as to the function of judicial precedents given in the preceding article,[11] the writer may be permitted to state that the chief example relied upon by Professor Gray [12] in support of his contention that the function of the judges is not (as in the orthodox view) declaratory, but creative, seems to him a little disingenuous. In form, no doubt, the court in *Pells* v. *Brown* merely decided that that peculiar kind of future limitation known as an executory interest could not be destroyed by a common recovery, when it was intended to work in defeasance of a fee simple. And equally, no doubt, it is unlikely that testators who were not lawyers had ever considered the question in that form. But there is evidence that, long before *Pells* v. *Brown* was decided, executory devises of the kind occurring in that case had been in familiar use; and though, immediately after the passing of the Statute of Uses [13] the Common Law Courts (which had not before had an opportunity of pronouncing upon them) had expressed an opinion adverse to their validity, that opinion had, somehow, been clearly overcome. The question in *Pells* v. *Brown* was then, substantially, whether by allowing the fiction of a common recovery to be extended to a purpose for which it was not introduced,[14] a well-established practice should be, in effect, invalidated. Professor Gray appears also to have considered

[10] NATURE AND SOURCES OF THE LAW. By John Chipman Gray (Columbia University Lectures), 1909.

[11] 30 HARV. L. REV. 17–19.

[12] *Op. cit.*, pp. 223–26.

[13] Prior of Smithfield's Case, Dyer, 33 *a* (1536).

[14] In fact the introduction of the common recovery as a bar of an estate tail seems itself to show even the impotence of an Act of Parliament in the face of well-established custom.

with less attention than it deserves the important fact that the English Parliament, by virtue of its representative character, succeeded rapidly, even in the earliest days of its existence, in establishing, in the name of the 'good customs of the realm,' a decided check on judicial activity, though that activity had been in familiar exercise for more than a century.

But if the writer is unable to accept Professor Gray's view of the origin of law, at any rate of English law, he is the more anxious to express his indebtedness to the late Royall Professor for the admirable explanation of the nature of the State, which, whatever be the origin of law, always plays, in civilized communities, a profoundly important part in its administration. The expression 'State machinery' is familiar enough; but few writers, at least few juristic writers, have, so clearly and briefly as the late Royall Professor,[15] brought out the essentially 'inhuman' character of that organization. Man has an ideal or mystical side to his nature, which causes him, like Israel of old, to worship the work of his own hands; and the tendency is not confined to physical productions — it would be far less dangerous if it were. Thus the notion of the 'Sovereign State,' like the irresistible powers of steam and electricity, may become a profound source of danger to the community which has allowed it to be seized by unscrupulous hands; and so the Austinian view of the State, as the source of all law, is not only contrary to obvious historical facts, but dangerous to the last degree. We know, of course, that the State is the source of a great deal of law, or, to speak more exactly, that a great deal of law is the product of those individuals who have, for the time being, got hold of the State machinery. But some of us are by no means convinced of the superiority of that law to the law made by the community itself, and count it a danger to the community whose theory of the State places no limits upon the creation of State law.

It is, therefore, as the writer regards it, no unmixed evil that English law is so chary of invoking the conception of the State, and displays such a limited capacity for feigning, or, if the expression be preferred, recognizing, personality. Doubtless there are incon-

[15] *Op. cit.*, Ch. III. The influence of traditional language on thought seems, however, to be illustrated even in the argument of Professor Gray, who, after describing the State as 'merely a device,' speaks, almost in the same breath, of 'the men and women who compose it' (p. 67).

veniences attending this poverty of imagination, as was made evident in the difficulties raised in the prosecution which led to the passing of the Official Secrets Act, 1889, a statute that contains one of the earliest instances in English law of the use of the word 'State' to signify the totality of the nation.[16] Even here, as the Act contains no definition of the term,[17] we are not compelled to conclude that Parliament gave its sanction to the somewhat anthropomorphic tendencies of modern writers, who insist[18] on seeing in the 'State' a juristic personality which is all the more dangerous that, in theory at least, the British Empire is a 'unitary State,' in which a monstrous omnipotence, known as 'sovereignty,' not only resides, but resides under the control of a comparatively limited number of individuals. Such a theory, though it undoubtedly has its uses when the community is fighting for its life against an external attack, is full of danger in normal times, when it is apt to be exploited by unscrupulous individuals. Better an avowedly catastrophic remedy, like the Roman Dictator.

It is a less disputable and more purely juristic objection to English law, that it does in some cases clumsily what it might do exactly, and that it scandalously neglects minor reforms which it might easily accomplish but for pure inertia. A striking example of the former defect is the procedure technically known as the 'action of seduction.' It is possible to argue, that the difficulty of deciding from which side the temptation proceeded in any given case is an insuperable objection to allowing the action at all; though, if the damages were strictly limited to the pecuniary loss suffered by the woman, that argument would appear to be difficult to maintain. But to allow, as English law does, the action to be brought, yet to make its success depend upon wholly irrelevant circumstances — worse still, to place the assumed victim of the wrong at the mercy of the nominal plaintiff so far as the fruits of victory are concerned — is surely an excess of clumsiness of which any English lawyer must feel ashamed. The anomalies of the action are duly set out in the

[16] S. 1 (1) (*b*) 'in the interest of the State.' Of course, the term is familiar in other senses, *e. g.*, 'His Majesty's Principal Secretaries of State,' and even (though less common) as a community occupying a definite area, *e. g.*, 'State of New South Wales.'

[17] Neither does the amending Act of 1911.

[18] *E. g.*, in Professor Jethro Brown's lucid excursus (THE AUSTINIAN THEORY OF LAW, pp. 254–70).

Digest;[19] but, to state them in compact form, it may be said that an employer whose female servant has been heartlessly betrayed has it in his own unfettered power to decide whether or not the seducer shall be compelled to pay damages, and, having decided in the affirmative, to pocket the damages without allowing the woman to receive a farthing; further, that, where the employer has himself been the seducer, the action will not lie at all, unless it can be proved (or at least inferred) that the employment was merely a blind; and, finally, that the death of the employer, after the seduction but before the pregnancy is declared, is equally fatal to the action. The blame for these grotesque absurdities does not, at least primarily, lie upon the shoulders of the judiciary, who have made the best of a clumsy machinery; but it is difficult to decide whether mere callousness, or hypocrisy, or pure ignorance, is most responsible for their continuance. A similar criticism applies, though to a less degree, to the uncertainty which still surrounds the very practical question, whether a civil action can be brought to recover damages for a tort which is also a felony, before the defendant has been tried for the felony.[20] This uncertainty was felt as a grievance two centuries and a half ago; and the 'Barebones' Parliament of 1653 framed a proposal to abolish it. But it has continued serenely ever since.

It has been a charge often levied against English law that, while it resorts freely to the coarse argument of physical force, and the somewhat base argument of pecuniary mulct, it makes little or no attempt to employ the more genial sanction of reward. But this criticism appears to be ill founded. It is true that the more obvious and palpable forms of reward are somewhat sparingly used, and that, with the steady discouragement meted out in recent generations to 'penal actions,' there might even appear to be a reaction against this method. But it can hardly be overlooked that one highly important branch of English law, *viz.*, the Law of Property, now operates very powerfully to stimulate industry by means of rewards. It may be, as was suggested above, that the original object of this branch of the law was to discourage violence; and the writer is certainly not prepared to maintain that the notion of property cannot establish itself without legal sanction. No one who has

[19] Bk. II, Pt. III, Sect. V, Tit. I.

[20] DIGEST, § 741. A slight advance toward clearing up the doubt has been made by the recent decision in Smith *v.* Selwyn, [1914] 3 K. B. 98.

studied the ways of children or animals can fail to see that there is a deep psychological basis for proprietary ideas. But it is quite obvious that this psychological tendency has been powerfully stimulated, both by statutory enactment and by judicial decision, in English law, with the deliberate object of producing exertions which it is deemed desirable, on public grounds, to encourage. The whole theory of feudalism, which extended far beyond the obvious sphere of land tenure, was based upon the idea of making people do very difficult work by an ingenious system of 'payment by results'; and the maxim: *boni judicis est ampliare jurisdictionem*, is merely an application of the system to public offices. Again, in spite of the clearly realized dangers of allowing *choses* in action to be treated as property, there has been a steady development, both by statute and decision, of the orbit of property in English law, of which the doctrines of 'good will' and 'passing off'[21] are conspicuous modern examples. It is more than probable that, of the millions of people who daily resort to the popular attractions of the 'picture-shows,' only a few score realize that, but for certain modern changes in copyright law, these fascinating exhibitions would be impossible, at any rate on the existing scale; but the fact is so. The attempt, not altogether successful, to extend the protection afforded by the Statutes of Labourers to the interference with contractual[22] or even merely business relationships,[23] is at least evidence of the willingness of English courts to widen the notion of property.

The writer does not, of course, claim that the safeguards proffered by the Law of Property can be regarded as the sole, or even as the chief stimulus of the acquisitive instincts of mankind, still less that such a stimulus is, in any given system, always desirable or wholesome in its effects. The first impulse to industry undoubtedly was of a much more direct character, being, in all probability, simply fear of hunger. And even when primitive conditions have passed away, the glittering display of wealth afforded by any great centre of population — what Bagehot, in his inimitable way, called 'the bait' — is a stimulus which must make a wider appeal than any legal protection of wealth, because its appeal is to the senses, whilst that of the Law of Property is mainly to the reason. Another almost equally

[21] DIGEST, Bk. III, Sect. XIII, Tit. VI, §§ 1675–80.
[22] DIGEST, Bk. II, Pt. II, Sect. V, Tit. IV, § 963.
[23] *Ibid.*, § 964; Sect. III, Tit. IV, § 894.

powerful stimulus is, of course, the principle of competition, the recognition of the almost universal desire *se faire valoir*, which is a regulated and modified form of primitive predatory instincts. Still, the regular and skilful manner in which these instincts have been buttressed and rendered effective by the development of the English Law of Property, must undoubtedly be regarded as a striking and successful application of the sanction of reward.

There is one special branch of the Law of Property which, by reason of its effects and the more than doubtful justification usually put forward for its maintenance, deserves a few words. There is to be observed in the works of modern defenders of the *status quo* a certain coyness in dealing with the laws which sanction inheritance and testamentary succession. Mr. Mallock, for example, in his well-known work, *A Critical Examination of Socialism*, glides very lightly over the subject,[24] though it is, as John Stuart Mill long ago pointed out, not one which any scientific individualist, as distinct from a mere political controversialist, need fear to handle. But the older apologists who sought a justification for the system found it in what is, undoubtedly, one philosophical justification of the Law of Property, *viz.*, the stimulus which it affords to industrial energy. The writer is more than doubtful whether this justification was ever in real accordance with the facts, even in the days when the family played a larger part in the organization of the community than it now does. He is inclined to think that the practical difficulty of preventing disputes which would inevitably arise upon a recurrence of the dead man's possessions to a common stock, played at least as large a part in the law of inheritance as the desire to provide for the family *sacra*, or even the desire to make provision for the family liabilities. And, at any rate, in countries which have adopted unlimited liberty of testation, this argument cannot be said to carry very much weight; for though, doubtless, the threat to 'cut off with a shilling' a recalcitrant son, or the hint of 'remembering in his will' a dutiful servant, may be of value to a rich man in securing obedience or service, it may well be questioned whether power of that kind does not do more harm than good to the community.

But, in fact, in the present individualistic state of society, there is little warrant for assuming that a desire to benefit offspring or other

[24] London, Murray, 1908. See especially chs. X, XIII (220–26), XIV (244) — 'his family after his death were to be turned into the street, beggars' (Why 'beggars'?).

legatees constitutes any appreciable stimulus to industry. The average industrious man is industrious, partly because he believes that his industry will bring him either material comfort or social consideration, partly because he has been taught to believe that industry is virtuous — about the meaning of 'virtue' he does not stop to consider — and partly because, to his temperament, industry means that stimulation of the nervous system which is the secret of happiness, physical and mental. Of course, these motives vary in proportionate influence in different individuals; and it is not suggested that altruistic elements are not to be found in at least one of them. All that is maintained is, that the desire of benefiting his posterity is not a leading motive in the industry of the average industrious man.

If this view appears to be cynical, it is possible to put it to the simplest of tests. There never has been a time in the history of English law when a man could not give away in his lifetime what he could dispose of by his will. On the contrary, until comparatively modern times (and to some extent even now) there has been much property which a man could give away in his lifetime but could not dispose of by his will. In recent times there has even been added a powerful financial inducement, in the shape of Death Duties, to an owner of property to give it away in his lifetime. To some slight extent, no doubt, this additional inducement has had effect, though, be it observed, chiefly amongst those whose property has not been acquired by their own industry, and on whom, therefore, the stimulus of the Law of Property can have had little or no direct effect. But, for the most part, even the desire of escaping the hated Death Duties, though it has produced various attempts at evasion, has not induced the most efficacious step of all, *viz.*, the distribution of property in its owner's lifetime; and we are left to choose between the alternatives of attributing this result to an unwillingness to defraud the Exchequer of its anticipated revenue, or to an unwillingness to accelerate the happiness of those for whose benefit the accumulation of wealth was, *ex hypothesi*, intended.

It looks as though the philosophical jurist must find a new justification for the Law of Succession.

May the writer, in conclusion, venture, without incurring the reproach addressed to those who trespass beyond their proper province, to hint at what he conceives to be the true function of a legal

system, and to estimate, in untechnical language, the extent to which English law fulfils that function?

We are taught that the most precious thing in the universe is that mysterious principle which we call 'life,' and that the preservation and multiplication of life is, or should be, the chief object of the guides (official or unofficial) of mankind. Even the melancholy theory of Malthus did not, seemingly, deny this truth; it merely despaired of the efforts of humanity to give effect to it on more than a limited scale. And, in any case, the achievements of industrial science have long since laid the bogy which Malthus raised.

But if this doctrine be true of individuals, why should it not also be true of communities? Doubtless there are communities (to say nothing of States[25]) whose existence appears to be of somewhat doubtful augury for the welfare of mankind; but, if we believe that every individual, at least until he has given irrefragable proof to the contrary, is worthy of life, are we not much more bound to believe this true of an entity which has been brought into existence by mutual needs and services?

We are also told by physiologists that the essential condition of physical life is the accordance of the object with its environment. Is there any reason to doubt that the same condition applies to the life of a community, which is, of course, a spiritual life, for a community can have no physical existence apart from that of its members?

Let us pursue the matter a little further, always remembering the dangers which attend the argument from analogy.

In spite of the wave of pragmatism which is, with somewhat disastrous results, passing over the world, most persons whose opinions are of value admit, or assume, that, while the influence of mankind on its environment is rapidly growing, there yet remain certain unalterable conditions subject to which all human activity must work; and it cannot be for nothing that these conditions have received, in practically all the tongues of western civilization, the name of 'laws.' Doubtless, as Professor Gray forcibly urges in the work before referred to,[26] there are important differences between these 'laws' and the laws with which a jurist is primarily

[25] It is essential to the writer's argument that the distinction between the community and the artificial organization known as 'the State' should be borne in mind (see above, pp. 112–116).

[26] NATURE AND SOURCES OF THE LAW, p. 213.

concerned; but those differences do not alter the fact that jurists, like all other people, have to reckon with them, unless, perhaps, we take the narrow view that a jurist is concerned only with the form of laws and not with their contents. What is the use or the interest of an elaborate *hortus siccus* of mere legal formulæ, apart from the influence on human conduct which these represent? For, as Montesquieu says, laws are 'the necessary relations derived from the nature of things.'

Unfortunately, however, these unalterable conditions are not easy to discover, especially those affecting human intercourse. While it is not going too far to say, that the progress of ascertaining them as they affect inorganic and even organic, but non-human, phenomena, has been, especially of late years, astounding, it must be confessed that infinitely less success has attended the researches of the students of human nature, and especially of human nature as it manifests itself in common life. And it is not difficult to see why. For, with all the marvellous complexity which characterizes the world of inanimate nature, and the world of plant and brute life, man presents the further baffling complexities raised by the existence of reason and will. We may say, if we like, that these qualities are also present, to some degree, in the brute creation; just as we may say that the communal, or at least the gregarious instinct or faculty, is also present there. But the fact remains that the difference of degree, in these respects, between mankind and the brutes, is so great as to amount to a difference of kind. After all, if we go back to the primitive protoplasm, differences cease to exist, or, at any rate, to be distinguishable.

In face of the problems raised by this infinite complexity, there is but one refuge from despair, *viz.*, the belief in a fixed rule and order which, if we could but discover it, would solve them. This is the foundation of faith: there is no chance, only ignorance. All the wisest and greatest of mankind have believed this — theologians, moralists, lawyers, naturalists; but only the last, by reason of the comparative simplicity of their material, have gone far to demonstrate it. Something has, however, been done by those students who grapple with the infinitely more difficult problems of human conduct; and in the religious, the moral, and the legal systems of the world we see the results. It is, of course, a commonplace of anthropology, that these three branches of human endeavour have spe-

cialized off from a common stock within comparatively recent times, even in western civilization; it is almost equally clear, that the separation of the physical and the moral sciences has taken place within a period which we may fairly call historical. And it is one of the peculiar marks of modernity in English law that, on the whole, it shows a remarkable tendency to restrict itself to its own special sphere, avoiding appeals to the emotions, which are the typical methods of religion, and to the reason, which are the subtle weapons of morality.

Having, then, to deal with what is, perhaps, the most intractable of all media, the human will, the builders of English law have never forgotten that this medium is one of the most direct and, therefore, one of the most precious manifestations of life, neither to be stamped out as necessarily anarchical, nor to be stored up and used like one of the blind forces of inanimate nature. Only when it manifests itself in ways obviously fatal to the life of the community, does the community, acting on the primary law of self-defence, interfere to crush the individual will; only where the object to be gained, in itself essential to the welfare of the community, cannot be achieved by spontaneous effort, does the community harness the individual will to the chariot of State. English law takes life itself as the guide to life, and treats the individual as a man, not as a machine. It is this deep respect for individual liberty within widely drawn bounds that is the dominant note of English law; and it is justified by the vigour, the achievements, above all the internal harmony, of those communities which, the world over, have adopted its principles. It is difficult to imagine any more cogent proof that English law is in accord with the truth of things.

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